

**POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

JOHN AND KAREN STEENSMA,

Appellants,

v.

WASHINGTON STATE DEPARTMENT
OF ECOLOGY and BAYES BROTHERS,
LLC,

Respondents.

PCHB No. 11-053

**ORDER GRANTING SUMMARY
JUDGMENT TO ECOLOGY**

John and Karen Steensma (Steensmas) filed an appeal with the Pollution Control Hearings Board (Board) challenging a letter from the Washington State Department of Ecology (Ecology) dated March 8, 2011, regarding water resources for the Bertrand Creek Estates Plat. The plat applicant is Bayes Brothers, LLC (Applicant). Ecology filed a motion for summary judgment, and the Applicant joined in the motion. Steensmas oppose the motion.

Assistant Attorney General Alan M. Reichman represented Ecology. Attorney Heather A. Wolf represented the Applicant. Attorney Barbara Dykes represented the Steensmas.

The Board ruling on the motion was comprised of Kathleen D. Mix, Chair, William H. Lynch, and Andrea McNamara Doyle. Administrative Appeals Judge Kay M. Brown presided for the Board. The Board reviewed the following pleadings submitted by the parties:

1. Letter dated March 8, 2011, attached to the Steensmas' Notice of Appeal;
2. Ecology's Motion for Summary Judgment and Declaration of Kasey Ignac in Support of Ecology's Motion for Summary Judgment with attached exhibits 1 through 3;
3. Applicant's Memorandum in Support of Ecology's Motion for Summary Judgment;

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4. Petitioners Steensmas' Response to Ecology's Motion for Summary Judgment and Declaration of Tom Ehrlichman in Support of Steensmas' Response to Ecology's Motion for Summary Judgment with attached exhibits A through D;
5. Applicant's Reply Brief in Support of Ecology's Motion for Summary Judgment, Declaration of Heather Wolf in Support of Applicant's Reply Brief in Support of Ecology's Motion for Summary Judgment with attached exhibit A;
6. Ecology's Reply to the Appellants' Response Memorandum; and,
7. Ecology's Statement of Additional Authority¹ with attached case decision.

Based on its review of the record and foregoing pleadings, the Board enters the following ruling:

BACKGROUND

The Applicant filed an application with Whatcom County Planning and Development Services requesting preliminary approval for the development of Bertand Creek Estates. The Applicant sought approval for a long subdivision, consisting of a cluster of nine lots and a buildable reserve tract on an approximately 22-acre parcel. *Ignac Decl.*, ¶5 and Ex. 1.

As part of the application process, the Applicant was required to identify the sources of water for the subdivision. This is required so that the County can comply with the requirements of RCW 58.17.110, which prohibit a local government from approving a proposed subdivision unless the local government makes written findings that the applicant has made appropriate provisions for potable water supplies. RCW 58.17.110(2). The Applicant's original proposal for domestic water service for the subdivision consisted of the use of an existing water connection to the Delta Water Association for one parcel and the provision of domestic water supply to the

¹ The Board considered only the case cited to the extent it is applicable. It did not consider the argument contained in the pleading filed, nor did it consider the Steensmas' briefing filed in response. *See* RAP 10.8 (Statement of additional authorities should not contain argument.); WAC 371-08-450(4)(a) and (b)(authorizing only responses and replies to dispositive motions).

1 other nine parcels from two “exempt” wells. The amount of water that the nine parcels could use
2 from the exempt wells was capped at 5,000 gallons per day. The Applicant also proposed to use
3 an existing irrigation water right to provide water for lawns and landscaping associated with the
4 residential development. *Ignac Decl., ¶5 and Ex. 1*

5 The County requested comments regarding the proposal through the State Environmental
6 Policy Act (SEPA) review of the proposal. On June 22, 2010, Ecology submitted a comment
7 letter on the County’s proposed determination of non-significance, requesting that any water
8 right that was proposed for use be identified, and that specific information regarding water
9 systems providing water be provided. *Ignac Decl., ¶7 and Ex. 3.*

10 Over an almost four month period, the County hearing examiner conducted a multiple
11 day hearing on the application. One point of controversy during the hearing was the proposed
12 use of the two exempt wells. On March 8, 2011, during the ongoing hearing examiner process,
13 Ecology sent a letter to the Whatcom County Health Department providing “additional
14 information and clarification” about water resources for the proposed Bertrand Creek Estates
15 subdivision. Ecology pointed out that Bertrand Creek Estates could use multiple exempt wells as
16 a water source, but that the total amount of water they could use from these wells could not
17 exceed 5,000 gallons, the maximum allowed for an exempt withdrawal. Ecology also stated that
18 Bertrand Creek Estates could use water right G1-22119C that is appurtenant to the intended
19 project consistent with the terms of the water right. Ecology went on to state that “irrigation of
20 lawn and garden is **not** considered **inconsistent** with a specified purpose of ‘irrigation.’” *Ignac*
21 *Decl., ¶¶5, 6 and Exs. 1 and 2.*

1 The Applicant, during the County hearing, amended its proposal to drop the proposed use
2 of one of the two exempt wells for the Bertrand Creek Estates. Their new proposal was for the
3 subdivision's water to come from the single existing water connection to the Delta Water
4 Association, one exempt well, and water right G1-22119C, which is limited in use to watering
5 for lawns and gardens. The Hearing Examiner, in his decision, made a finding that this proposal
6 was adequate to provide water for the subdivision. The Hearing Examiner went on to grant the
7 preliminary subdivision approval in a decision which he issued on May 25, 2011. The
8 Steensmas appealed the Hearing Examiner's decision to the County Council on June 8, 2011.
9 *Ignac Decl., ¶5 and Ex. 1; Wolf Decl. ¶3 and Ex. A.*

10 In addition to their appeal to the County Council, the Steensmas also filed an appeal at
11 the PCHB. Their PCHB appeal is of the March 8, 2011 letter which Ecology provided to the
12 County. It is this appeal that is the subject of Ecology's motion to dismiss. Ecology contends
13 that the PCHB lacks jurisdiction over this appeal because the March 8, 2011 letter from Ecology
14 to Whatcom County was not an agency action or decision subject to appeal to the PCHB.

15 ANALYSIS

16 1. Summary Judgment

17 Summary judgment is a procedure available to avoid unnecessary trials where formal
18 issues cannot be factually supported and cannot lead to, or result in, a favorable outcome to the
19 opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). The summary
20 judgment procedure is designed to eliminate trial if only questions of law remain for resolution.
21 Summary judgment is appropriate when the only controversy involves the meaning of statutes,

1 and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v.*
2 *Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990), *review denied*, 117 Wn.2d
3 1004 (1991).

4 The party moving for summary judgment must show there are no genuine issues of
5 material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton*
6 *Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a
7 summary judgment proceeding is one affecting the outcome under the governing law. *Eriks v.*
8 *Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). If the moving party satisfies its burden,
9 then the non-moving party must present evidence demonstrating that material facts are in
10 dispute. *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990),
11 *reconsideration denied* (1991). In a summary judgment proceeding, all facts and reasonable
12 inferences must be construed in favor of the non-moving party. *Jones v. Allstate Ins. Co.*, 146
13 Wn.2d 291, 300, 45 P.3d 1068 (2002).

14 In this case, the Board concludes that the facts necessary to rule on the motion are not in
15 dispute and the matter is ripe for summary judgment.

16 2. Ecology's letter was not an appealable order

17 The Board, as an administrative agency, has only those powers expressly granted to it by
18 the Legislature, or necessarily implied therefrom. *Skagit Surveyors and Engineers, LLC v.*
19 *Friends of Skagit County*, 135 Wn.2d 542, 558, 958 P.2d 962 (1998). The Board's jurisdiction is
20 set out in RCW 43.21B.110. In the context of water rights, RCW 43.21B.110 authorizes the
21 Board to review decisions by Ecology on water right applications, civil penalties, water right

1 relinquishment orders, and regulatory orders issued by Ecology. *See Bohart & Cochran v. Dep't*
2 *of Ecology*, PCHB Nos. 94-49 & 94-50, ¶8 (Order of Dismissal, Sept. 23, 1994); RCW
3 43.21B.110(1)(d)(authorizes the Board to hear appeals relating to the issuance, modification, or
4 termination of any permit, certificate, or license by the department); RCW
5 43.21B.110(1)(a)(authorizes the Board to review appeals of civil penalties issued under the
6 Water Code, RCW 90.03.600); RCW 43.21B.110(1)(b)(authorizes the Board to review appeals
7 of water right relinquishment orders issued by Ecology pursuant to RCW 90.14.130). In
8 addition, under RCW 43.21B.110(1)(i), the Board has jurisdiction to hear appeals related to
9 “[a]ny other decision by the department . . . which pursuant to law must be decided as an
10 adjudicative proceeding under chapter 34.05 RCW [the Administrative Procedure Act].”

11 Here, the document the Steensmas have appealed is a letter sent by Ecology to the
12 Whatcom County Health Department, commenting on the Bertrand Creek Estates proposal for
13 water for their subdivision. The letter provides Ecology’s opinion that only one groundwater
14 exemption is allowed for any one project, that multiple wells can be used to withdraw
15 groundwater without a water right, so long as the total does not exceed the 5,000 gallons per day
16 limitation of RCW 90.44.050, and that the withdrawal of water for the purpose of watering lawns
17 and gardens is consistent with a specified purpose of irrigation.²

18 The letter which the Steensmas appealed, while offering Ecology’s views on the
19 applicant’s proposal for water supply for the subdivision, does not constitute an Ecology decision

20 ² The Board notes that this view appears inconsistent with the position advocated by Ecology and affirmed by the
21 Board in *City of West Richland v. Ecology*, PCHB No. 01-033, Background Section, ¶7, Analysis Section, ¶8
(Summary Judgment Order, Aug. 4, 2003)(holding that using a groundwater irrigation right for irrigation of
residential lawns and yards requires a change in purpose of use).

1 on a water right application. The letter does not purport to make any actual determinations on
2 the extent, validity, or status of water rights associated with the subdivision application that the
3 Applicant filed with the County. Further it does not constitute a decision or adjudication by
4 Ecology on the permit-exempt groundwater use that may occur to supply water for the project, or
5 the status of the water right documented by Certificate No. G1-22119C. The Applicant has not
6 filed an application for a water right from Ecology, nor does it appear likely that it will need to,
7 given the method it has proposed to obtain water for the subdivision.

8 Further, the letter is not a civil penalty, regulatory order, or water right relinquishment
9 order. It was not sent directly to the applicant, and it does not contain any language indicating
10 that it is an appealable decision as required by RCW 43.21B.310(4). *See Sylvia Ridge*
11 *Developers, LLC v Ecology*, PCHB No. 07-139 (Order Granting Summary Judgment, March 14,
12 2008)(noting that the failure to include this language is an indicator that a document is not an
13 appealable order).

14 The Steensmas argue that there is a contested issue of fact regarding whether Ecology's
15 letter is in fact a comment letter, or whether it is a determination by Ecology. They contend that
16 it is necessary to examine, as a factual matter, to what extent the County relied upon Ecology's
17 letter. However, even if the County relied heavily on the letter from Ecology in making its
18 decision regarding whether appropriate provisions had been made for potable water for the
19 subdivision, the County's reliance on Ecology cannot change the Legislature's choice that the
20 County is the appropriate entity to make the decision. Pursuant to RCW 58.17.110(2), and
21

1 therefore as a matter of law, it is the County's legal responsibility to make a decision on
2 establishment of a subdivision, and the status of the provision of water for the subdivision.

3 The Steensmas also argue that the letter is a permit decision because it is a decision not to
4 require a permit. Therefore, they argue, this Ecology decision is reviewable by the Board, either
5 under RCW 43.21B.110(1)(d) as a permit decision, or under RCW 43.21B.110(1)(i), as a
6 decision by Ecology requiring an adjudicatory hearing. The problem with this argument is that
7 the Legislature has chosen to allow an exemption from the permitting requirements for "single or
8 group domestic uses in an amount not exceeding five thousand gallons a day." By statute,
9 Ecology cannot render any binding decision with respect to Bertrand Creek Estate's intention to
10 supply domestic water under the permit exemption because no application is required, and
11 Ecology does not have the statutory authority to make a permitting decision. Because Ecology
12 has not made a permitting decision, this Board lacks jurisdiction over this appeal.

13 This does not mean, however, that Ecology is powerless to act in this situation or that the
14 Steensmas are left without a forum in which to raise their concerns. For example, Ecology has
15 authority to issue regulatory orders to limit or stop certain water use, correct impairment, or to
16 adopt water management rules in a watershed, as it deems appropriate. *See, e.g.*, RCW
17 43.27A.190, RCW 90.44.130, RCW 90.54.050, WAC 173-150-080. The Steensmas have
18 already pursued one avenue for further review by appealing the Hearing Examiners decision to
19 the Whatcom County Council. Other avenues may also be available, including an action in
20 superior court for impairment or for review of Ecology's decision not to act in light of identified
21 water management concerns. Finally, since it appears that policy choices made by the

1 Legislature have contributed to the Steensmas' fundamental disagreement with how Ecology is
2 managing water resources in the Bertrand Creek Basin, a legislative solution may be necessary.

3 The Board concludes that the letter sent by Ecology to Whatcom County was just what it
4 purported to be, a comment letter to Whatcom County Health Department providing information
5 and clarification regarding water resources for the Bertrand Creek Estates Plat. It is not a final
6 decision by Ecology appealable to this Board, and the Board does not have jurisdiction to review
7 it.

8 Based upon the foregoing analysis, the Board enters the following:

9 **ORDER**

10 Ecology's Motion for summary judgment is hereby GRANTED and the appeal is
11 dismissed.

12 DATED this 8th day of September, 2011.

13 **POLLUTION CONTROL HEARINGS BOARD**

14 KATHLEEN D. MIX, Chair

15 WILLIAM H. LYNCH, Member

16 ANDREA MCNAMARA DOYLE, Member

17 Kay M. Brown
Administrative Appeals Judge, Presiding